COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
SUSAN ROTTENBERG,
Complainants

v. DOCKET NO. 03-BEM-01359

MASSACHUSETTS DEPARTMENT OF
STATE POLICE,
Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Judith E. Kaplan in favor of Complainant Susan Rottenberg. Following an evidentiary hearing, the Hearing Officer concluded that Respondent was liable for unlawful discrimination on the basis of gender in violation of M.G.L. c. 151B, §4. The Hearing Officer found that Respondent treated Complainant, a female officer of the rank of Sergeant in the State Police, differently from her similarly-situated male peers. Specifically, the Hearing Officer found that Respondent failed to provide Complainant with equal access to a Sergeant's lounge, a separate changing area, and a locker at the Logan Airport barracks, for a two-year period from 2002 to 2004, at which time Respondent reconfigured the space to grant Complainant equal access to those areas utilized and enjoyed by male Sergeants. The facts established that at the time of Complainant's transfer to Logan Airport the male Sergeants used a former training room as a locker and break room. The room contained 20 to 25 lockers with the names of each male sergeant affixed. Additionally, the

room contained a large television, telephone, lounge chairs and a refrigerator and was used by the male sergeants during breaks to watch television, eat meals and relax. It was common knowledge that the male officers also used this area to change their clothes.

When Complainant transferred to Logan Airport she was the only female Sergeant among the twenty to twenty five sergeants in her Troop. Even though the locker and break room was used exclusively by Sergeants, Complainant was not initially told about it. When she learned of its existence, she asked for equal access to the area along with the other male Sergeants; however, because the men changed their clothes in the area, Complainant was uncomfortable about using the locker and break room. The Hearing Officer concluded that an initial attempt in 2003 to remedy the situation by establishing a separate locker and break room was insufficient to provide the Complainant with equal access to the area, because the break room could only be accessed through the locker area where the male Sergeants continued to change their clothes. A change that allowed Complainant equal access to the locker and break area was finally made in June of 2004, and thereafter she frequently used that space on equal basis with other male Sergeants.

The Hearing Officer ordered Respondent to cease and desist from discriminating on the basis of gender and awarded Complainant damages for emotional distress. Respondent has appealed to the Full Commission challenging the Hearing Officer's findings as to liability and damages.

STANDARD OF REVIEW

The responsibilities of the Full Commission are outlined by statute, the Commission's Rules of Procedure (804 CMR 1.00 *et. seq.*) and relevant case law. It is the duty of the Full Commission to review the record of proceedings before the Hearing

Officer. M.G.L. c. 151B, §5. The Hearing Officer's findings of fact must be supported by substantial evidence, which is defined as "...such evidence as a reasonable mind might accept as adequate to support a finding...." Katz v. MCAD, 365 Mass. 357, 365 (1974); M.G.L. c. 30A.

It is the Hearing Officer's responsibility to evaluate the credibility of witnesses and to weigh the evidence when deciding disputed issues of fact. The Full Commission defers to these determinations of the Hearing Officer. See, e.g., School Committee of Chicopee v. MCAD, 361 Mass. 352 (1972); Bowen v. Colonnade Hotel, 4 MDLR 1007, 1011 (1982). The Full Commission's role is to determine whether the decision under appeal was rendered in accordance with the law, or whether the decision was arbitrary or capricious, an abuse of discretion, or was otherwise not in accordance with the law. See 804 CMR 1.23.

BASIS OF THE APPEAL

Respondent has appealed the decision on the grounds that the Hearing Officer's findings were not supported by substantial evidence and that she erred as a matter of law in failing to require Complainant to establish the existence of discriminatory animus. Respondent argues that there is no evidence of pretext for discrimination on its part and that the Hearing Officer failed to consider Respondent's attempt to remedy the problem of unequal access to the Sergeant's locker and break area four days after Complainant first complained. Respondent also asserts that the Hearing Officer committed an error of law that prejudiced Respondent by denying its motion for a site inspection. It also asserts that the award of damages to Complainant for emotional distress in the amount of $20,000 was an error of law absent a causal connection between Complainant's alleged emotional distress and Respondent's alleged actions.

Having carefully reviewed Respondent's grounds for appeal and the full record in this matter and having weighed all the objections to the decision in accordance with the standard of

review stated herein, we find no material errors of fact or law with respect to the Hearing Officer's findings and conclusions of law. The Hearing Officer found that for a two year period, Respondent had "effectively created a men's clubhouse that excluded women." The Hearing Officer concluded that Respondent's articulated reasons for excluding Complainant from the locker and break room "demonstrate[d] a lack of awareness and a deliberate disregard for the importance of equal access to rank-specific amenities." Moreover, the Respondent's alleged attempt to remedy the problem of unequal access – by creating a new break room that also doubled as a changing area for the male sergeants – was understandably unsuccessful for exactly the same reasons that the initial area was inadequate. The Hearing officer properly found that Respondent's inaction in the first instance and inadequate remedial action thereafter constituted evidence of gender animus. We concur with the Hearing Officer's finding of discriminatory animus. The Appeals Court has since held that the deprivation of rank-specific locker rooms for police officers may constitute a material term, condition or privilege of employment sufficient to form the basis of a discrimination complaint and that the Superior Court's grant of summary judgment to the employer was an error. King v. City of Boston, 71 Mass. App. Ct. 460 (2008)

We also conclude that the Hearing Officer did consider the Respondent's first attempt to remedy Complainant's unequal access to the Sergeant's locker/break room shortly after she complained, but properly concluded that such efforts were insufficient to remedy the discriminatory terms and conditions of employment. She made this finding based on evidence that the male Sergeants continued to use the locker area for changing clothes and that Complainant could not access the break area without passing through the locker area. The Hearing Officer properly concluded that Respondent's creation of a new locker and break area, in attempt to resolve the matter, constituted a continuing violation of M.G.L. c. 151B and does

not, as Respondent contends, act as a bar to a finding of liability.

Finally, we conclude that the Hearing Officer's denial of Respondent's motion for a site inspection was well within her discretion, and we find no undue prejudice or error in her ruling. See Anthony's Pier Four, Inc. v. HBC Assocs., 411 Mass. 451, 477 (1991). The Hearing Officer accepted and credited the testimony of a number of witnesses, describing in detail the locker/break areas in question. The Hearing Officer could properly rely in this evidence, as sufficient in her estimation, to allow for proper findings and a full understanding of the issue. We see no reason to disturb her ruling in this regard.

As to Respondent's challenges to the Hearing Officer's award of emotional distress damages, we find that the award of $20,000 to Complainant was proper and supported by the evidence. The Supreme Judicial Court has articulated standards for the Commission to consider in rendering damage awards for emotional distress. See Stonehill College v. MCAD, 441 Mass. 549 (2004). These include the nature, character, severity and length of the harm suffered. Id. at 576. In addition, the Court stated that such awards should be "fair and reasonable and proportionate to the distress suffered." Id.

The Hearing Officer credited Complainant's testimony that over a two year period she felt isolated from her male colleagues, humiliated because her peers knew that she did not have equal access to the locker/break area and embarrassed when she walked in on male colleague(s) who were changing their clothes. The Hearing Officer concluded that such unequal terms and conditions of employment, which denied Complainant the opportunity to eat meals, socialize, and relax with her male peers, caused Complainant to feel embarrassed, alienated, and like a second-class citizen. The lack of opportunity to enjoy the same amenities provided to male Sergeants segregated Complainant in a profession where camaraderie and peer support are an

essential part of the job. We find that the Hearing Officer's award of damages is consistent with the standards set forth in Stonehill and that the award is fair, reasonable and commensurate with the emotional pain, embarrassment and humiliation suffered by Complainant.

For the reasons stated above, we deny the appeal and affirm the Hearing Officer's decision.

COMPLAINANT'S PETITION FOR ATTORNEYS' FEES AND COSTS

Having affirmed the Hearing Officer's decision in favor of Complainant, we conclude that Complainant is entitled to an award of reasonable attorneys' fees and costs. See M.G.L. c. 151B, §5. The determination of what constitutes a reasonable fee is within the Commission's discretion and relies upon consideration of such factors as the time and resources required to litigate a claim of discrimination in the administrative forum and the degree of success achieved, which may include the relief awarded. In determining what constitutes a reasonable fee, the Commission has adopted the lodestar method for fee computation. Baker v. Winchester School Committee, 14 MDLR 1097 (1992). This method requires a two-step analysis. First, the Commission calculates the number of hours reasonably expended to litigate the claim and then multiplies that number by an hourly rate which it deems reasonable. The Commission then examines the resulting figure, known as the "lodestar," and adjusts it either upward or downward or determines that no adjustment is warranted depending on various factors, including the complexity of the matter.

The Commission's efforts to determine the number of hours reasonably expended involves more than simply adding all hours expended by counsel. The Commission carefully reviews the Complainant's submission and does not simply accept the proferred number of hours as

"reasonable." See, e.g., Baird v. Belloti, 616 F. Supp. 6 (D. Mass. 1984). Hours for which compensation is sought that appear to be duplicative, unproductive, excessive, or otherwise unnecessary to prosecution of the claim are subtracted, as are hours that are insufficiently documented. Grendel's Den v. Larkin, 749 F.2d 945 (1st Cir.); Miles v. Samson, 675 F. 2d 5 (1st Cir. 1982); Brown v. City of Salem, 14 MDLR 1365 (1992). Only those hours that the Commission determines were expended reasonably will be compensated. In determining whether hours are compensable, the Commission considers contemporaneous time records maintained by counsel and reviews both the hours expended and tasks involved.

Complainant's counsel initially filed a petition seeking attorneys' fees in the amount of $105,440 for 401 hours of work and for costs in the amount of $4,329.45. The request is supported by detailed time records and affidavits. Respondent filed an opposition to Complainant's request asserting that while Complainant initially advanced three distinct claims, and later sought to include a fourth claim against Respondent, she tried and prevailed upon only one of those claims. Respondent claims that Complainant's attorneys spent the majority of time working upon an issue other than the claim prevailed upon at hearing. The claim which was tried involved a single issue of gender discrimination which was neither procedurally complex nor substantively difficult. Respondent also asserts that Complainant's billing entries do not allow the Commission to determine how much time was expended on the prevailing claim, and that Complainant charged for work that was duplicated by more than one attorney. Respondent further asserts that Complainant's billing for intra-office conferences and for a copy of the hearing transcript is excessive. Finally, Respondent asserts that the Commission should reduce the hourly rate of pay at which Complainant's counsel billed (*i.e.*, $350 per hour for the overseeing partner and $250 per hour for the attorney who tried the case).

Complainant filed a reply to Respondent's opposition wherein she reduced her request for attorneys' fees by 19% to discount for the time that Respondent asserts was spent on claims that Complainant did not pursue at hearing. Complainant also eliminated her request for compensation for work done by all attorneys other than Attorneys Liss-Riordan and Dector, the overseeing partner and the attorney who tried the case, respectively. That reduction eliminated an additional 17.1 hours. Complainant's counsel also deleted almost all entries in which a second attorney billed for an intra-office conference. In total, Complainant maintains that she eliminated 77.4 hours from her original request to have 401 hours compensated. Her modified request seeks compensation for 323.6 hours of work plus additional compensation for 9.5 hours counsel expended on the analysis and writing a reply brief on attorneys' fees. She thus seeks compensation for a total of 333.1 hours, which represents 83% of the original request. The hourly rate of compensation for both Complainant's attorneys remains the same as in her initial request.

At the outset, we conclude that the expertise of Attorneys Liss-Riordan and Dector in the area of employment discrimination law is amply supported by their affidavits and that their hourly rates of $350 and $250, respectively, are consistent with rates customarily charged by attorneys with comparable experience and expertise in such cases in the Boston area. We will thus compensate Complainant's attorneys at the hourly rates requested as we deem those rates to be reasonable.

Complainant initially sought compensation for 401 hours of work in the amount of $105,440. Attorney Liss-Riordan billed at a rate of $350 for 51.9 of those hours and Attorney Dector billed at $250 per hour at for 332 hours. At the outset we will accept Complainant's voluntary elimination of fees sought for work performed by attorneys other than attorneys Dector

and Liss-Reardon, and the deletion of fees for an inter-office conference. Thus we reduce the figure of $105,440 by an additional 17.1 hours billed at a rate of $250 per hour, or $4, 275. The resulting figure is $101,165.

However, we decline to award the Complainant the amount she seeks for recalculating her fee petition and thus will not reimburse her for the 9.5 hours of compensation sought at the rate of $350 per hour. We thus take a further reduction in the amount of $3,325, thereby reducing the lodestar to $97,840. We also decline to award Complainant's counsel compensation for her interactions with the media surrounding the issues in this case. We conclude that such work remains outside the scope of compensable legal work undertaken in furtherance of Complainant's success at the hearing before this Commission. This amounts to a further reduction of $3,120.[1] The resulting lodestar figure is $94,720.

We also accept Complainant's 19% voluntary reduction of the fee sought for time spent on claims Complainant did not pursue at the hearing. A 19% reduction of $94,720 is $17,996.80 and results in a lodestar figure of $76,723.20. We conclude, however, that this 19% reduction of the lodestar is still not reflective of a reasonable fee given the limited degree of success achieved, the lack of complexity of the matter, the relatively low damage award in the case, and the fact that several claims were either abandoned at the commencement of the hearing or dismissed at the preliminary disposition phase. These included claims relating to disparate discipline, evaluations and overtime and failure to issue Complainant a pager. Complainant ultimately tried and prevailed upon one claim only, which Respondent correctly notes was not excessively complex. The issues were not unique nor were they extraordinarily difficult. The damage award

[1] The Commission relied upon Complainant's billing statements to calculate this amount. Attorney Liss-Riordan billed for 6.2 hours at her hourly rate of $350 for a total of $2,170 and Attorney Dector billed 3.8 hours at her hourly rate of $250 for a total of $950. The Commission will, therefore, deduct a total of $3,120 from Complainant's claim for attorneys' fees for those hours billed concerning Complainant's interaction with the media.

to Complainant of $20,000 is not a significant award, as compared to the average post-hearing awards in employment cases at the Commission. Respondent sounds a final note that the amount of the fee request is overwhelmingly disproportionate to the award. We concur with Respondent that the fee request is disproportionate to the complexity of the case and the degree of success achieved in this matter, and, therefore, as discussed below, have determined that a further reduction of the fee request is appropriate.

At the outset we note that "the Supreme Court has identified results obtained as a preeminent consideration in the fee-adjustment process." Coutin v. Young & Rubicam Puerto Rico, Inc., 124 F.3d 331, 338, (1st Cir 1997). (*citing* Hensley v.Eckerhart, 461 U.S. 424, 440, (1983). The term results obtained can have variety of meanings and can "refer to a plaintiff's success claim by claim, or to the relief actually achieved, or the societal importance of the right which has been indicated, or to all of these measures in combination." Coutin, supra. at 338. The court went on to note that "all three types of 'results' potentially bear on the amount of an ensuing fee award." Id.at 338.

Recently our own Supreme Judicial Court reduced a fee request by almost one-half from $290,516 to $154,912 for work performed during appellate proceedings, where the award to plaintiff in a gender based employment discrimination case was just shy of two million dollars. Haddad v. Wal-mart Stores, Inc. (No. 2) 455 Mass.1024, 1025 (2010). The Court noted that determining the reasonableness of a fee request involves consideration of "the nature of the case and the issues presented, the time and labor required, **the amount of damages involved** (*emphasis added*), the result obtained," and other factors. Id. at 1025; *citing* Linthicum v. Archambeault, 379 Mass 381, 388-389 (1979). The SJC went on to note that it must examine the time reasonable expended to obtain the results achieved in the end. Id. at 1025 .

Having established that fee requests may be examined in light of the degree of success achieved, including the damage award obtained, we note that this Commission has considered fee requests in relation to the amount of damages awarded. The Full Commission justified a fee reduction in one case based on the fact that the fee sought was excessive in relation to the damages, noting, "though the award of fees is not grossly disproportionate to the overall recovery, it represents a figure which is in excess of 60% of the amount awarded." Patel v. Everett Industries, 18 MDLR 182, 184 (1996). We note that the fee sought in the intant case is almost four times the relief awarded to the Complainant and we believe the request to be grossly disproportionate to the monetary recovery achieved.

In addition to the award of damages we also consider the number of claims on which success was achieved. While the "most critical factor in determining the reasonableness of a fee award is the degree of success obtained," claims for relief may "involve a common core of facts or will be based on related legal theories," and that it is sometimes "difficult to divide hours expended on a claim-by-claim basis." Hensley, supra. at 435-436. Nonetheless, "a reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole." Id. at 440. Here there is a claim that Complainant prevailed on only one of a number of claims upon which she proceeded.

A review of Complainant's time records in the instant case reveals the difficulty in determining which pieces of work were undertaken in furtherance of a specific claim. However there is precedent at the Commission for reducing fee requests where a plaintiff lost on claims that were not sufficiently interconnected to the claim on which she prevailed. In Sanderson v. Town of Wellfleet Fire Department, 19 MDLR 60 (1997) the Commission reduced the

Complainant's fee request by 40% to reflect a lack of success on a claim for retaliation which the Commission found was not sufficiently interconnected with the successful claim of sexual harassment. We noted that, "since, as is usually the case, billing information is not specified by 'claim,' 'count,' or by 'cause of action,' the Commission must exercise its discretion to reduce the overall figure to some amount which may reasonably be said to have been expended in pursuit of the successful claim. Here, we are faced with a similar situation in which we must exercise our discretion to achieve a result that we determine to be fair and reasonable.

In our discretion, given Complainant's limited measure of success, relative to the initial claims advanced, and the relatively low damage award obtained, a further reduction of 20% of the lodestar figure is appropriate. We therefore adjust the lodestar figure downward by an additional 20%, of $76,723.20 or $15,344.64. We conclude that the resulting figure of $61,378. 56 is a reasonable fee in this case, and is justified by the public interest advanced in the litigation. We note that this amount, is more than three times the award in this case, and we find it to be significantly more reasonable than Complainant's fee request was which close to four times the relief awarded.

Complainant's counsel also seeks reimbursement for costs in the amount of $4,329.45. These costs include expenses related to photocopies, postage, courier services, facsimile transmissions and transcripts. We find that these costs are adequately documented and reasonable. Accordingly, we award costs in the amount sought to Complainant.

ORDER

For the reasons set forth above, we hereby affirm the decision of the Hearing Officer and issue the following Order:

1. Respondent shall pay emotional distress damages to Complainant in the amount of $20,000 as set forth in the Hearing Officer's decision, with interest thereon at the rate of 12% per annum from the date of filing of the complaint, until such time as payment is made or this Order is reduced to a court judgment and post-judgment interest begins to accrue.

2. Respondent shall pay the Complainant attorneys' fees in the amount of $61,378.56 for services performed by Attorneys Liss-Riordan and Dector with interest thereon at the rate of 12% per annum from the date the petition for fees was filed until such time as payment is made or a court judgment is rendered in this matter.

3. Respondent shall pay the Complainant costs in the amount of $4,329.45.

This Order represents the final action of the Commission for purposes of M.G.L. c. 30A. Any party aggrieved by this final determination may contest the Commission's decision by filing a complaint in superior court seeking judicial review, together with a copy of the transcript of proceedings. Such action must be filed within thirty (30) days of receipt of this decision and must be filed in accordance with M.G.L. c. 30A, c. 151B, §6, and the 1996 Standing Order on Judicial Review of Agency Actions. Failure to file a petition in court within thirty (30) days of receipt of this order will constitute a waiver of the aggrieved party's right to appeal pursuant to M.G.L. c. 151B, §6.

SO ORDERED this 26th day of May, 2010

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Malcolm S. Medley
Chair

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Sunila Thomas George
Commissioner